No. 18-1823

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RICHARD MARVIN THOMPSON,

Petitioner,

v.

WILLIAM P. BARR, Attorney General,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A045-882-548

BRIEF FOR RESPONDENT

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INTRODUCTION

Petitioner Richard Marvin Thompson ("Thompson") seeks review of an August 7, 2018 decision of the Board of Immigration Appeals ("Board" or "BIA") denying his third untimely motion to reopen. Thompson has twice previously been before this Court challenging the agency's rejection of his claim of having derived citizenship through his naturalized father and the agency's denial of his motion to reopen based on the same. This Court has upheld both of those decisions.

While his second petition was still pending with this Court, and four years after the final order of removal in his case, Thompson filed a third untimely motion

to reopen. Recognizing that his motion was untimely and numerically barred and that no exceptions to the time and number limits on reopening applied to his case, Thompson requested that the Board exercise its *sua sponte* authority to reopen proceedings based on receiving a legislative pardon of his 2001 assault conviction (sixteen years after the fact) by the Connecticut Board of Pardons and Paroles ("Board of Pardons"). The Court should dismiss this petition for review.

The Court lacks jurisdiction to review the Board's exercise of its *sua sponte* authority to reopen cases because there is no meaningful standard by which to judge the Board's exercise of discretion. The mere fact that the Board's exercise of discretion was based in part on a legal question is not sufficient to confer jurisdiction. Indeed, just as if the Board provided no reasoning for its conclusion that the motion did not warrant *sua sponte* reopening, there is no standard to apply to the Board's conclusion that Thompson failed to present an exceptional situation warranting reopening.

Moreover, even if the Court were to hold that it retains limited jurisdiction to determine whether the Board's exercise of discretion was based on a misapprehension of the law, Thompson fails to prove that the Board's exercise of its discretionary authority was legally erroneous. The Board's analysis comports

with the plain language of the statute and would otherwise be entitled to deference. Accordingly, the Court should dismiss or else deny the petition.

STATEMENT OF JURISDICTION

An Immigration Judge initially determined Thompson's removability in proceedings conducted pursuant to 8 U.S.C. § 1229a (2012). The Board had jurisdiction over Thompson's motion pursuant to 8 C.F.R. § 1003.2(a) (2018), which grants the Board the authority to entertain a request for reopening in any case in which it has rendered a decision.

This Court generally has jurisdiction to consider Thompson's review petition pursuant to section 242 of the Immigration and Nationality Act ("INA"), which confers exclusive jurisdiction on the courts of appeals to review final orders of removal. *See* 8 U.S.C. § 1252(a)(1) & (a)(5). The petition was timely filed on August 28, 2018, within thirty days of the Board's August 7, 2018 order denying the motion to reopen. *See* 8 U.S.C. § 1252(b)(1). Venue properly lies in this Court because Thompson's immigration proceedings were completed in Boston, Massachusetts, which is within this judicial circuit. *See* 8 U.S.C. § 1252(b)(2).

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the Court lacks jurisdiction to review the Board's discretionary decision not to *sua sponte* reopen proceedings where there are no meaningful standards by which to measure the Board's exercise of discretion.

(2) Whether, assuming that the Court has limited jurisdiction to determine whether the Board's reasoning was premised on a misapprehension of the law, the Board properly exercised its discretion in denying Thompson's third untimely motion to reopen where the pardon he received was from a legislatively derived body and therefore insufficient to waive his removability under 8 U.S.C. § 1227(a)(2)(A)(vi) ("pardon waiver"), which waives certain grounds of removability where the alien has been pardoned by the President of the United States or a state governor.

STATEMENT OF THE CASE

I. Thompson's Underlying Removal Proceedings And First Petition In This Court

Thompson is a native and citizen of Jamaica who, in 1997, was admitted to the United States as a lawful permanent resident. A.R. 448, 510. In 2001, Thompson was convicted of second-degree assault in Connecticut in violation of Conn. Gen. Stat. § 53a-60; he received a five-year suspended sentence and three years of probation. A.R. 436-46, 449. In early 2012, the Department of Homeland

Security ("DHS") commenced removal proceedings against Thompson by filing a Notice to Appear ("NTA") in Immigration Court. A.R. 510-12. The DHS charged that, in light of his assault offense, Thompson is removable under 8 U.S.C. § 1227(a)(2)(A)(i) and (iii), for having been convicted of both an aggravated felony crime of violence and a crime involving moral turpitude. A.R. 512.

After his removal proceedings began, Thompson filed an Application for Certificate of Citizenship with United States Citizenship and Immigration Services ("USCIS"). A.R. 454-67. USCIS denied the application. A.R. 328-29, 346-47, 385-86, 392-94. In proceedings, Thompson denied the charges of removability and renewed his argument that he should derive citizenship through his father.[1] *See* A.R. 473-74. Ultimately, in June 2013, the Immigration Judge issued a decision sustaining the charges of removability, "adopt[ing]" USCIS's determination that Thompson had not derived citizenship, and ordering Thompson removed to Jamaica. A.R. 278-82; *see also* A.R. 392-94 (USCIS's reasons for rejecting the citizenship claim). Thompson appealed the Immigration Judge's decision to the Board. A.R. 232-45, 269-71. On July 23, 2014, the Board

[1] Thompson also filed but later withdrew an application for deferral of removal under the Convention Against Torture. *See* A.R. 377, 383-85, 415-24.

affirmed, agreeing with the Immigration Judge's determination that Thompson had not derived citizenship through his father. A.R. 218-21.

Thompson then sought review of the Board's decision in this Court.[2] *See Thompson v. Lynch*, Dkt. No. 14-1858. On December 29, 2015, the Court published a precedential opinion denying Thompson's petition for review. *See Thompson v. Lynch*, 808 F.3d 939 (1st Cir. 2015). The Court upheld the agency's determination that Thompson did not derive citizenship from the naturalization of his father. 808 F.3d at 940-42.

II. Thompson's First Motion To Reopen

More than seven months later, in August 2016, Thompson filed a motion to reopen his removal proceedings with the Board. A.R. 131-92 (supporting documents). Thompson argued that he was eligible for CAT protection based on changed conditions in Jamaica, *i.e.*, a risk of being harmed by gang members.[3] A.R. 135, 143.

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[2] Around the same time, Thompson also filed a motion with the Board asking it to reconsider its July 2014 decision. A.R. 202-12. The Board denied that motion by separate order on September 30, 2014. A.R. 194-96. Thompson never sought this Court's review of the Board's decision denying his request for reconsideration.

[3] The claims mirror those presented in the prior CAT application that Thompson withdrew. *See* A.R. 419-20.

The Board denied Thompson's motion in October 2016. A.R. 122-25. It concluded that the motion was untimely and "ha[d] not been shown to satisfy any exception to the [relevant] time limitations." A.R. 124. In particular, the Board determined that the country conditions information offered by Thompson, most of which predated his hearing, lacked specificity and failed to demonstrate materially changed conditions in Jamaica to excuse the delayed filing. *Id.* The Board also declined to exercise its *sua sponte* authority to reopen proceedings. A.R. 124-25. Thompson never petitioned for review of the Board's 2016 order.

III. Thompson's Second Motion To Reopen And Second Petition In This Court

Thompson filed a second motion to reopen with the Board in March 2017, stating, without further explanation, that reopening was warranted in light of the Second Circuit's decision in *Morales-Santana v. Lynch*, 804 F.3d 520 (2d Cir. 2015), *aff'd in part, rev'd in part, and remanded*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). A.R. 114-20.

On May 5, 2017, the Board denied Thompson's second motion to reopen. A.R. 96-97. The Board determined that Thompson's most recent motion was both time- and number-barred and that the motion did not qualify for any exception to the filing requirements. A.R. 97. The Board also once again found no basis for reopening Thompson's case under its own *sua sponte* authority. *Id.*

Thompson filed a petition for review of the Board's decision with this Court. *See Thompson v. Sessions*, Docket No. 17-1804. The Court denied the petition in an unpublished order on May 18, 2018. *See* Judgment, Docket No. 17-1804 (1st Cir. May 18, 2018).

IV. Thompson's Third Motion To Reopen And The Board Decision On Review

On March 19, 2018, while his second petition for review was pending in this Court, Thompson filed a third motion to reopen with the Board. A.R. 67-94; *see also* A.R. 60-63. In this motion, Thompson asserted that on December 6, 2017, the Connecticut Board of Pardons granted him a pardon of his 2001 assault conviction. A.R. 68; *see* A.R. 62. Recognizing that in Connecticut, the power to pardon is legislatively granted, Thompson requested termination of proceedings without citing any legal authority for the Board to do so.[4] A.R. 71-73.

On August 7, 2018, the Board denied as time- and number-barred Thompson's third motion to reopen. A.R. 20-22. The Board recognized that no exception to the time and numerical bars to reopening applied in this case. A.R.

[4] On May 29, 2018, Thompson filed a petition for review with the Seventh Circuit Court of Appeals requesting remand to the Board based on his receipt of a pardon from the Connecticut Board of Pardons. *See* Petition for Review, Docket No. 18-2185 (7th Cir. May 29, 2018), ECF No. 1. The Seventh Circuit dismissed that petition. Order, Docket No. 18-2185 (7th Cir. Jul. 24, 2018), ECF No. 7.

21. The Board further declined to exercise its *sua sponte* authority to reopen proceedings. A.R. 21-22. Acknowledging that, if Thompson were eligible for a pardon waiver, it would waive his removability as an alien convicted of an aggravated felony and crime involving moral turpitude, the Board concluded that Thompson failed to show that he was eligible for the waiver. A.R. 22.

The Board observed that, to qualify for a pardon waiver, the pardon must be of an executive rather than a legislative nature. A.R. 22 (citing *Matter of Nolan*, 19 I&N Dec. 539 (BIA 1988)). The Board recognized that, while the INA requires that the pardon come from the President or a Governor, in some states the supreme pardoning power rests with some other executive body, and those pardons may be considered a Governor's pardon where the State has a constitutional provision for such authority to be exercised by the Board of Pardons. *Id.* (citing *Matter of Tajer*, 15 I&N Dec. 125, 126 (BIA 1974)). The Board determined that Thompson failed to show that Connecticut has a constitutional provision for the gubernatorial pardon authority to be exercised by the Board of Pardons such that the pardon he received may be considered a Governor's pardon. *Id.* Indeed, the Board noted that Connecticut did not confer pardon power in its constitution; instead, the power is legislatively derived. *Id.* The Board concluded that because the pardon power is not executively derived, it is not effective for purposes of establishing entitlement

to a pardon waiver. A.R. 22. Lastly, the Board concluded that *sua sponte* reopening is not warranted where the evidence of the pardon is an uncertified photocopy. *Id.* Accordingly, the Board declined to exercise its authority to reopen Thompson's case.[5] *Id*. The instant petition for review ensued.[6]

SUMMARY OF THE ARGUMENT

The Court should dismiss the petition for review because it lacks jurisdiction to review the Board's decision not to *sua sponte* reopen proceedings. Because the Board's *sua sponte* reopening powers are not regulated by the statute and are invoked only by what the agency deems to be sufficiently exceptional circumstances as to warrant action, no review of a determination declining to reopen *sua sponte* is to be had. There are no exceptions to this jurisdictional bar. Although some courts have carved out exceptions to the jurisdictional rule in order to review whether the Board's exercise of discretion is based on a misapprehension of the law, the Court should decline the invitation to do so here.

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[5] On August 24, 2018, Thompson filed a motion to reconsider with the Board. A.R. 9-10. The Board denied Thompson's motion on March 13, 2019. It does not appear that Thompson had filed a petition for review of the Board's March 13, 2019 decision.

[6] There are two different amicis participating in this case – the American Immigration Council ("AIC") and the State of Connecticut ("CT"). References to the briefs in this case will be to Petitioner's Brief ("Pet. Br."), AIC, or CT.

Even assuming, however, that the Court has limited jurisdiction to review whether the Board's exercise of discretion was based on a faulty legal premise, no such error exists in this case. In declining to reopen Thompson's case, the Board correctly interpreted the pardon waiver provision in the INA and faithfully applied its prior precedent. The language of the pardon waiver is clear: the relevant grounds of removability can be waived only by pardons granted by the President of the United States and the Governors of the several states and, as Thompson admits, Connecticut's Board of Pardons is a legislative creation. Because the Board's interpretation is consistent with the plain statutory mandate, the Board did not commit any reviewable legal error in declining to reopen Thompson's case. Accordingly, the Board should either dismiss or deny the petition for review.

ARGUMENT

I. Scope And Standard Of Review

This Court reviews legal questions, including jurisdictional issues, *de novo*, "giving deference to the agency's reasonable interpretation of the statutes and regulations within its purview." *Gonzalez v. Holder,* 673 F.3d 35, 38 (1st Cir. 2012); *see Costa v. Holder*, 733 F.3d 13, 16 (1st Cir. 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). That standard requires a reviewing court to determine "whether 'the statute is silent or

ambiguous with respect to the specific issue' before it; if so, 'the question for the court [is] whether the agency's answer is based on a permissible construction of the statute.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (quoting *Chevron*, 467 U.S. at 843).

The Court generally reviews the agency's denial of a motion to reopen under the highly deferential abuse of discretion standard. *Bead v. Holder*, 703 F.3d 591, 593 (1st Cir. 2013). To demonstrate an abuse of discretion by the agency, the petitioner must show that the agency acted in an arbitrary or capricious manner, such as providing no rational explanation for its conclusions, or committed an error of law. *Id.*; *see also Warui v. Holder*, 577 F.3d 55, 58 (1st Cir. 2009).

A motion to reopen is "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (internal quotation omitted). In general, however, such motions are disfavored because of the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions to reopen are particularly disfavored in immigration proceedings where "every delay works to the advantage of the [removable] alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314,

323 (1992). To be sure, this Court has noted and incorporated in its jurisprudence the admonition that motions to reopen are disfavored. *See*, *e.g.*, *Hang Chen v. Holder*, 675 F.3d 100, 105 (1st Cir. 2012); *Le Bin Zhu v. Holder*, 622 F.3d 87, 91 (1st Cir. 2010); *Warui*, 577 F.3d at 58.

II. Law Governing Motions To Reopen

Congress mandated that, in general, an alien may file only one motion to reopen removal proceedings based on new facts within ninety days after the final order of removal. *See* 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2); *Neves v. Holder*, 613 F.3d 30, 32-33 (1st Cir. 2010). Congress provided limited exceptions to the ninety-day filing deadline, such as for aliens who are filing for asylum based on previously unavailable evidence of changed country conditions, or who are applying for special relief as a certain battered victim, or who were removed *in absentia* without proper notice. 8 U.S.C. § 1229a(c)(7)(C)(ii)-(iv); 8 C.F.R. § 1003.2(c)(3). In addition, the Board's "regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings 'on its own motion' – or, in Latin, sua sponte – at any time." *Mata v. Lynch*, 135 S. Ct. 2150, 2153 (2015) (quoting 8 C.F.R. § 1003.2(a)). An alien who has failed to file a timely motion to reopen may ask the Board to exercise its *sua sponte* authority to reopen proceedings. The s*ua sponte* reopening procedure is

established by Board regulations, not the INA, and is committed to agency discretion by law.

The Board "invoke[s] [its] *sua sponte* authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133-1134 (BIA 1999); *see Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).

III. The Court Lacks Jurisdiction To Review The Board's Exercise Of Its *Sua Sponte* Authority To Reopen Proceedings

A. There Are No Judicially Manageable Standards By Which To Review The Board's Decision Not To *Sua Sponte* Reopen

Because the Board's *sua sponte* reopening authority is not regulated by statute but is instead subject only to what the agency deems to be sufficiently exceptional as to warrant action, there are no meaningful standards or guidelines by which to review the Board's *sua sponte* determination. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. at 1133-34; *see also Lenis v. United States Att'y Gen.*, 525 F.3d 1291, 1293 (11th Cir. 2008) (recognizing that the authority to *sua sponte* reopen is derived from regulation, not the statute, and the regulation "provides absolutely no standard to govern the [Board's] exercise of its discretion"). Thus, the courts of appeals have generally recognized that no

standard exists by which they can assess the validity of the Board's exercise of its unfettered discretion to *sua sponte* reopen a case. *See Gyamfi v. Whitaker*, 913 F.3d 168, 176 (1st Cir. 2019) (collecting cases); *see also Luis v. INS,* 196 F.3d 36, 40 (1st Cir. 1999) (recognizing that "no judicially manageable standards are available for judging how and when [the BIA] should exercise its discretion," making it "impossible to evaluate [the] agency action for 'abuse of discretion'"). This Court has "long held that '*sua sponte* authority is committed to the unbridled discretion of the BIA, and the courts lack jurisdiction to review that judgment.'" *Reyes v. Sessions*, 886 F.3d 184, 188 (1st Cir. 2018) (quoting *Charuc v. Holder*, 737 F.3d 113, 115 (1st Cir. 2013)); *see Heckler v. Chaney*, 470 U.S. 821, 829-31 (1985).

The Board's *sua sponte* authority lives outside the parameters that govern ordinary motions to reopen proceedings, and the Board has explained that, for that reason, the powers should be reserved for the truly extraordinary case – what the Board has described as "unique situations where it would serve the interest of justice." *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998). In essence, *sua sponte* reopening is an act of administrative grace, much like a pardon or a grant of prosecutorial discretion and, as such, not appropriate for judicial review. *Cf. Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("[P]ardon

and commutation decisions have not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects of judicial review."); *see also Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting prosecutorial discretion is "particularly ill-suited to judicial review" because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake"). And just as decisions in these other contexts are non-reviewable because there are no meaningful standards to apply, the Court should likewise decline the invitation to question the Board's exercise of pure discretion here.

B. Allowing Judicial Review Of *Sua Sponte* Reopening Contravenes Congressional Intent

The purposes of the INA, and of its judicial review provisions, would be undermined if determinations by the Board not to exercise its discretionary *sua sponte* reopening authority were subject to judicial review. Congress enacted statutory provisions governing motions to reopen and judicial review in 1990 and 1996 to prevent abuses of motions to reopen by imposing time and numerical limitations on such motions, shortening the time for judicial review, and requiring the consolidation of a petition for review of the denial of a motion to reopen with a

petition for review of the underlying order of removal. *See* 8 U.S.C. § 1252(b)(6). Those changes were adopted to expedite the process of administrative and judicial review, the final resolution of removal proceedings, and the actual removal of the alien. *See Dada v. Mukasey*, 554 U.S. 1, 12-15 (2008); *Stone v. INS*, 514 U.S. 386, 393-394 (1995).

A determination by the Board whether to exercise its discretion to reopen a case *sua sponte* may be made many months or years after the order of removal became final, the time for filing a statutory motion to reopen has long since passed (or such a motion has been denied), and the time for judicial review has expired. If determinations made in such circumstances were then judicially reviewable, the result would be to circumvent the time and numerical limits Congress imposed on motions to reopen. *Cf. Califano v. Sanders*, 430 U.S. 99, 108 (1977) (holding that judicial review of a decision not to reopen Social Security benefits determination was barred because, inter alia, allowing such review "would frustrate the Congressional purpose to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"); *see also ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 279-280 (1987); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).

The history of the Board's reopening authority further supports the conclusion that allowing jurisdiction over *sua sponte* reopening would be contrary to Congressional intent. Since the enactment of the INA in 1952, and in accordance with the authority delegated from Congress, the Attorney General promulgated a series of regulations defining the "[p]owers of the Board," which included the power to "reopen[] . . . any case in which a decision has been made by the Board." 17 Fed. Reg. 11,475 (Dec. 19, 1952) (§§ 6.1(b) and (d), 6.2) (emphasis omitted); *see also* 23 Fed. Reg. 9118-9119 (Nov. 26, 1958) (§ 3.2) (clarifying that the Board may reopen proceedings in response to a motion by the parties or on its own motion). While Congress thereafter addressed motions to reopen filed by aliens, it has never addressed the Board's *sua sponte* reopening power, despite directing the Attorney General to issue certain regulations and codifying key portions of them. *See Dada*, 554 U.S. at 13; *see also* 61 Fed. Reg. 18,905 (Apr. 29, 1996). Thus, although Congress has decided that aliens have a personal right under the INA to file one motion to reopen within the time limit specified, it has "taken no steps to establish an individual right" for aliens to seek or obtain *sua sponte* reopening, instead leaving that discretionary mechanism entirely to the Board. *Gor v. Holder*, 607 F.3d 180, 195 (6th Cir. 2010); *see Zhang v. Holder*,

617 F.3d 650, 662 (2d Cir. 2010) (noting that, although Congress had codified standards for timely motions to reopen based on new evidence, it "was silent as to . . . the [Board's] *sua sponte* authority").

C. Nothing In 8 U.S.C. § 1252(a)(2)(D) Confers Jurisdiction Over *Sua Sponte* Reopening

This Court has expressly declined to decide whether there are any exceptions to the jurisdictional bar over *sua sponte* reopening. *See, e.g., Gyamfi*, 913 F.3d at 176. It should find that there is no such exception.[7] In *Gyamfi*, and the cases that proceeded it, the question was whether 8 U.S.C. § 1252(a)(2)(D) confers jurisdiction on the Court to review questions of law and constitutional claims in the context of *sua sponte* reopening. Section 1252(a)(2)(D), however, has no bearing here. The statute provides:

> Nothing in subparagraph (B) or (C) [of 8 U.S.C. § 1252(a)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

[7] The Second Circuit has cautioned that courts should only exercise hypothetical jurisdiction in the narrowest circumstances. *Ortiz-Franco v. Holder*, 782 F.3d 81, 86 (2d Cir. 2015).

8 U.S.C. § 1252(a)(2)(D). By its plain text, that section restores jurisdiction only where the INA has otherwise restricted jurisdiction. Denials of *sua sponte* reopening requests, however, are not made unreviewable because of a provision in Section 1252(a) or elsewhere in Chapter 12 of Subchapter II of Title 8; rather, they are unreviewable because the decision whether to exercise *sua sponte* authority is "committed to agency discretion by law" within the meaning of the Administrative Procedure Act. *See Rais v. Holder*, 768 F.3d 453, 464 (6th Cir. 2014) (rejecting the claim that 8 U.S.C. § 1252(a)(2)(D) provides jurisdiction to review *sua sponte* decisions and concluding that *sua sponte* authority is not subject to judicial review, even for constitutional claims or questions of law); *see also Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1286 n.7 (11th Cir. 2016) (explaining that § 1252(a)(2)(D) has no impact on the Court's jurisdiction to review *sua sponte* reopening because jurisdiction over *sua sponte* reopening is not stripped through the INA). Section 1252(a)(2)(D) therefore cannot render an otherwise unreviewable decision reviewable merely because it involves a legal or constitutional question.

D. The Mere Fact That Thompson's Motion Implicated A Legal Question Does Not Make The Board's Exercise Of Discretion Reviewable

The Court should likewise decline AIC's invitation to adopt the approach put forth by the Second, Third, and Ninth Circuits, which permit the court to

exercise jurisdiction over a *sua sponte* denial for the limited purpose of determining whether the agency "misperceived the legal background and thought, incorrectly, that a reopening would necessarily fail." *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009); *accord Bonilla v. Lynch*, 840 F.3d 575, 583, 588 (9th Cir. 2016) (finding jurisdiction to review the Board's exercise of its *sua sponte* authority "so as to assure that the Board made its discretionary decision on the correct understanding of the applicable legal principles"); *Pllumi v. U.S. Att'y Gen.*, 642 F.3d 155 (3d Cir. 2011) (holding that the court has "jurisdiction to the limited extent of recognizing when the BIA has relied on an incorrect legal premise"). This approach is fundamentally flawed.

The mere fact that Thompson's motion to reopen ostensibly involved a legal question does not provide a reason for the court to assume jurisdiction. *Cf. Brotherhood of Locomotive Engineers*, 482 U.S. at 280 (restricting review over a motion to reopen brought under the Hobbs Act alleging material error). Indeed, the absence of jurisdiction over the Board's *sua sponte* authority does not depend on the arguments the alien presents in his request for reopening or the reasons (if any) the Board gives for denying the request. The Supreme Court has specifically rejected the notion that, "if the agency gives a 'reviewable' reason for otherwise

unreviewable action, the action becomes reviewable." *Brotherhood of Locomotive Engineers*, 482 U.S. at 283.

The Board may choose not to favorably exercise its discretion to reopen a case for a variety of reasons, and the Board is not required to explain why it has declined to do so in a particular case. When it does not reopen proceedings *sua sponte*, the Board is not adjudicating the merits of the original removal order anew and is not necessarily reaching the merits of any new legal argument or claim to relief an alien might be savvy enough to include in his belated motion. To the contrary, it is electing not to exercise its discretion to revisit the removal order – reflecting only that in the Board's judgment the case does not constitute a "truly exceptional situation[ ]" that warrants that "extraordinary remedy." *Matter of G-D-*, 22 I&N Dec. at 1133-1134. That determination no more constitutes an adjudication of the merits of the underlying removal order than a determination by this Court or other appellate courts in declining to grant discretionary review. That is clear from the text of the regulations authorizing reopening, which state that the Board may deny reopening (whether on motion or *sua sponte*) "even if the party moving has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a).

To be sure, the Board often does give reasons for such a determination for the benefit of the parties, as it did in this case. But the Board's choice to do so

does not then make its discretionary determination subject to judicial review. *See Brotherhood of Locomotive Engineers*, 482 U.S. at 283. If the reviewability of the Board's determination not to reopen a proceeding *sua sponte* turned on the reasons the Board articulated, it would create a substantial disincentive for the Board to explain its action at all, and could create unnecessary disparities within and among the courts in terms of the scope of review.

IV. Even If The Court Concludes That It Has Jurisdiction To Look At The Pardon Issue, The Board's Exercise Of Discretion Is Not Premised On A Legal Error

Even if the Court has limited jurisdiction to decide whether the Board erred in declining to exercise its *sua sponte* authority to allow Thompson to challenge his removability in light of his state pardon, it should still deny the petition for review. The Board's denial of *sua sponte* reopening was not premised on a mistake of law. It is important to note that, assuming jurisdiction, the issue before the Court is not whether a pardon from the Connecticut Board of Pardons is actually sufficient for purposes of the statutory pardon waiver, but rather, whether the Board's exercise of discretion was based on an incorrect legal premise.

Thompson's untimely and numerically-barred motion sought to eliminate the criminal basis for his removability through a pardon waiver. Such a waiver is authorized under 8 U.S.C. § 1227(a)(2)(A)(vi) if "the alien subsequent to the

criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States." Thompson argued in his motion that his pardon from the Connecticut Board of Pardons qualifies for purposes of the pardon waiver, but the Board concluded that it does not. A.R. 21-22. The Board's determination is reasonable and would otherwise be entitled to deference.

Thompson's eligibility for a pardon waiver turns on a question implicating the agency's construction of a statute which it administers (the pardon waiver codified at 8 U.S.C. § 1227(a)(2)(A)(vi)). Thus, in determining whether the Board's analysis rests on a misapprehension of the law, the Court should apply *Chevron* deference to the Board's interpretation of that statute. *Garcia v. Sessions*, 856 F.3d 27, 35 (1st Cir. 2017). The Court first asks whether Congress has directly spoken to the precise question at issue. *Id.* (citing *Succar v. Ashcroft*, 394 F.3d 8, 22 (1st Cir. 1997) (internal citations and quotations omitted)). If so, courts must give effect to the unambiguously expressed intent of Congress. *Id.* (internal citations and quotations omitted). If the Court determines that Congress has not directly addressed the precise question at issue, then the Court moves to the second step of the analysis. At the second step, the Court does not simply impose its own construction of the statute; rather, if the implementing agency's construction is

reasonable, the Court must accept the agency's construction of the statute. *Id.* (citing, *inter alia*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

A. The Plain Language Of The Pardon Waiver Statute Limits The Waiver To Presidential And Gubernatorial Pardons

The pardon waiver statute is unambiguous and the Board's interpretation should be upheld under *Chevron* step one. The relevant pardon waiver language gives credit *only* to pardons granted by the "President of the United States or by the Governor of any of the several States." 8 U.S.C. § 1227(a)(2)(A)(vi). Congress's intent to limit the pardon waiver to Presidential and gubernatorial pardons is clear. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (recognizing that Congress is presumed to mean what it says when statutory language is unambiguous); *see also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (explaining that statutory construction begins "with the statutory text" and, "unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning").

Here, there is no question that Connecticut's Board of Pardons is neither the Presidential nor a Governor, nor is it enshrined in the Connecticut constitution. *See* Conn. Gen. Stat. § 54-124a(a)(1) (creating the Board of Pardons and Paroles). Rather, in Connecticut, the pardoning power is vested in the state legislature,

which has delegated its exercise to the board of pardons. *See id.; McLaughlin v. Bronson*, 537 A.2d 1004, 1006 (Ct. 1988). Indeed, the Connecticut Supreme Court has recognized that the state pardon power is not executive, but instead resides in a legislatively created administrative agency. *See McLaughlin*, 537 A.2d at 1006 (citing *Dumschat v. Board of Pardons, State of Conn.*, 432 F. Supp. 1310, 1312 (D. Conn. 1977) (explaining the history of the Connecticut Board of Paroles), *aff'd*, 593 F.2d 165 (2d Cir.1979), *remanded*, 618 F.2d 216 (2d Cir. 1980), *rev'd*, 452 U.S. 458 (1981)). Because the Board's analysis in this case comports entirely with the plain language of the pardon waiver statute, it cannot be said that the Board's exercise of discretion in denying *sua sponte* reopening was based on a misperception of the law. Accordingly, the Court's inquiry into the Board's exercise of discretion should end here. *See United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999) ("When as now, the plain language of a statute unambiguously reveals its meaning, and the revealed meaning is not eccentric, courts need not consult other aids to statutory construction."); *see also Goldings v. Winn*, 383 F.3d 17, 24 n.7, 28 (1st Cir. 2004) (explaining that the Court need not look at the legislative history of a statute where "the statute's text is encompassing, clear on its face, and productive of a plausible result").

B. If There Is Any Ambiguity In The Statute, The Board's Decision To Limit The Pardon Waiver To Executive Pardons Is Reasonable

Even if the pardon waiver statute contained some ambiguity, the Court should still decline to exercise jurisdiction over this case because the Board's interpretation of the ambiguous statutory language is reasonable, such that its exercise of discretion was not based on a legal error. Under *Chevron* step two, the Court must accept the agency's choice as to how to resolve a statutory ambiguity if it is reasonable. *Garcia*, 856 F.3d at 39. Although the Board has applied the pardon waiver statute to pardons granted by a Board of Pardons where the body's authority is delegated to it by the Governor or is otherwise executively derived, it was not unreasonable for the Board to decline to extend the waiver to pardons granted by a body whose authority is statutorily derived.

The Board has consistently held that, for purposes of the pardon waiver, it will only recognize executively derived pardons. *See Matter of R-*, 5 I&N Dec. 612, 619 (BIA 1954) (explaining the history of the pardon waiver, which exhibits Congress's "express intention to grant exemption from deportation only to those aliens who have obtained an *executive* pardon") (emphasis in original); *see also Matter of Tajer*, 15 I&N Dec. 125, 126 (BIA 1974) ("We recognize executive pardons granted by a State which has constitutional provision for executive

pardons to be issued by other than the Governor of a State."). That includes situations where the Governor or state constitution delegates the executive pardon authority to a Board of Pardons. *See, e.g., Matter of D-*, 7 I&N Dec. 476, 477 (BIA 1957) (holding that a pardon from the Georgia Board of Pardons is sufficient for a pardon waiver because Georgia has a constitutional provision for executive pardons to be issued by the Board of Pardons); *Matter of Tajer*, 15 I&N Dec. at 126 (explaining that, in 1945, Georgia's Board of Pardons and Paroles was made a constitutional body and was conferred the clemency powers formerly conferred upon the Governor). It does not, however, include circumstances where the supreme pardon authority does not ultimately rest with the executive.

Amici contend that the relevant distinction is not whether the pardoning power rests with the executive or the legislative branch of government, but whether the pardon was issued automatically by operation of law or as the result of a deliberative process. AIC at 15-17, 19-20; CT at 7-10; *see also* Pet. Br. 17-20, 22. Amici further argue that Connecticut's pardon authority is "executive-like," that the members of the Board of Pardons are appointed by the Governor, and thus, a Board decision should be sufficient for purposes of the pardon waiver. AIC at 20-21; CT at 15-20. However, that interpretation is not supported by the language of the pardon waiver statute, which clearly indicates that only Presidential and

Gubernatorial pardons are sufficient; if Congress had intended to include "executive-like" pardons in the pardons waiver clause, it could have done so.[8] *Cf. United States v. Johnson*, 529 U.S. 53, 58, (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

Further, the interpretation proposed by Amici is not supported by the case law, which focuses on whether the pardon was executively derived and does not rest on whether it was the result of a deliberative process. *See, e.g.*, *Matter of Nolan*, 19 I&N Dec. 539, 544 (BIA 1988) (emphasizing that the pardon in that case "was neither granted by the Governor of Louisiana nor issued by an otherwise constitutionally-recognized executive body"); *Matter of R-*, 5 I&N Dec. at 619 (granting a pardon waiver "only to those aliens who have obtained an *executive* pardon"); *Matter of Tajer*, 15 I&N Dec. at 126 ("The pardon granted the

[8] Likewise, if Congress truly intended to include all pardons issued by a deliberative body, not just by the executive, as Amici suggests, it could have amended the language of the pardon waiver statute, as it has done in other contexts. For example, the INA used to contain a provision for judicial recommendations against deportation ("JRAD"), which operated as a judicial pardon, but Congress vacated that provision in 1990. 8 U.S.C. § 1251(b)(2) (repealed 1990); *see Solis-Chavez v. Holder*, 662 F.32d 462, 466-67 (7th Cir. 2011) (recognizing the repeal of the JRAD provision).

respondent is unconditional and is an executive pardon duly granted by executive authority as provided in the Constitution of the State of Georgia."). The fact that the BIA has also declined to credit automatic pardons that are issued by operation of law ("so-called legislative pardons") does not render its decision to also discredit Connecticut's non-executive pardon unreasonable, nor does it create a "legal error" that might allow the Court to review the Board's exercise of discretion. *See* Pet. Br. 21.

The cases upon Amici rely upon to suggest otherwise do not help Thompson. *See* AIC at 18; CT at 11-12. For example, in *Matter of K-*, 9 I&N Dec. 336, 338-39 (BIA 1961), the Board applied the pardon waiver to a pardon granted by the United States High Commissioner for Germany for a conviction that occurred in Germany during a period where the United States Military was the supreme authority in that region. The Board reasoned that, because an executive order designated the United States High Commissioner for Germany as the supreme pardoning authority for sentences imposed by the United States Military while it was in control in that part of Germany, the pardon counted as an "executive pardon." *Id.* In that case, unlike the instant case, the pardon authority was executively derived via executive order. *Id.* Similarly, in *Matter of Tajer*,

15 I&N Dec. at 126, the Board granted a pardon waiver to a pardon issued by the Georgia Board of Pardons, but only after noting that the pardon was "an executive pardon duly granted by executive authority" via the Georgia Constitution. Lastly, in *Matter of C-R-,* 8 I&N Dec. 59, 61 (BIA 1958), the Board applied the pardon waiver to a pardon that was granted by the city mayor for the alien's city ordinance violation. That case is inapposite because, in Nebraska, a "violation of a city ordinance while in form a criminal prosecution, is in fact a civil proceeding to recover a penalty," and the Governor of Nebraska only has the authority to pardon criminal offenses. *Id.* In short, these cases do not hold that anything short of an executive pardon is sufficient under the INA. And because Connecticut's pardon authority is purely a legislative creation, the Board reasonably concluded that such a pardon did not qualify for a waiver under the statute.

Amici also argue that the Board "abandoned its settled course of adjudication" in not recognizing Connecticut's legislatively-derived pardon power. AIC at 22; CT at 10-12. However, the Board has never addressed in a published decision whether a pardon from a legislatively derived body constitutes a pardon for purposes of the pardon waiver. AIC has identified only a single, seventeen-year-old unpublished Board decision in which the Board concluded otherwise; that is hardly proof of a "settled course of action" to the contrary. Indeed, the Board's

internal policies establish "[u]npublished decisions are binding on the parties to the decision but are not considered precedent for unrelated cases." BIA Prac. Man., Ch. 1.4(d)(ii) (rev. Oct. 16, 2018); *see De Leon-Ochoa v. Att'y Gen. of U.S.*, 622 F.3d 341, 350 (3d Cir. 2010) (recognizing that "single-member BIA decisions have no precedential value, do not bind the BIA, and therefore do not carry the force of law except as to those parties for whom the opinion is rendered"). *But see Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994) (criticizing the Board for treating virtually identical legal issues inconsistently in unpublished decisions).

Lastly, the State of Connecticut argues that not recognizing Connecticut's legislatively-created pardons for purposes of the pardon waiver denies its residents equal protection of the law and threatens Connecticut's sovereignty. CT at 21-27. However, these arguments overlook that the federal government has exclusive domain over immigration law, including the power to designate which aliens are subject to removal. *See Kwai Chiu Yuen v. INS*, 406 F.2d 499, 501 (9th Cir. 1969) (citing *Fong Yue Tin v. United States*, 149 U.S. 698 (1893)). With regard to equal protection, the Court will uphold a distinction (here, based on the type of pardon received) if it is rationally related to a legitimate government purpose. *Veira Garcia v. INS*, 239 F.3d 409, 414 (1st Cir. 2001). The government need not actually articulate at any time the purpose or rationale supporting its classification.

Id. Here, the federal government has a rational basis for limiting the pardon waiver to executively-derived pardons.[9] "A legislative classification must be wholly irrational to violate equal protection." *de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (citation and internal quotation marks omitted). "Challengers have the burden to negate every conceivable basis which might support a legislative classification whether or not the basis has a foundation in the record." *Id.* The State of Connecticut has not done that here.

With regard to Connecticut's sovereignty, Congress's decision to only recognize executive pardons does not nullify the effect of a pardon in the State of Connecticut. *See Kwai Chiu Yuen,* 406 F.2d at 501-02 (explaining that a pardon exempts the convicted from punishment but, "deportation, while burdensome and severe . . . , is not punishment") (quoting *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913)); *see also Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1252 (9th Cir. 2008) (recognizing that a state pardon does not removal all legal consequences of a conviction). And the State of Connecticut remains free to modify its Constitution to grant the Governor the pardoning power.

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[9] For example, the meaning of "legislative pardon" could be stretched far beyond what Congress intended when creating the pardon waiver; for example, it could potentially include private bills granting a pardon by state legislative bodies or individual legislators.

Although Thompson and Amici raise various claims regarding the underlying pardon issue, none is sufficient to establish that the Board committed some reviewable and reversible legal error in denying Thompson's third untimely motion to reopen. The fact that the Board could have reached another reasonable interpretation of the statute before it does not render the interpretation it reached unreasonable. *See Craker v. Drug Enforcement Admin.,* 714 F.3d 17, 26 (1st Cir. 2013) (recognizing that, as long as the agency's interpretation is not arbitrary or capricious, the Court may not substitute its own judgment for that of the agency, even if it disagrees with its conclusions); *cf. Cantarero v. Holder,* 734 F.3d 82, 86-87 (1st Cir. 2013). Ultimately, the Court need not reach the pardon issue because its jurisdiction over the *sua sponte* denial is lacking; but, if it does, it should nevertheless deny the petition for review.[10]

[10] If the Court, however, decides both that it has jurisdiction and that the Board's exercise of discretion rested on a legal error, the Court should remand the case to the Board to decide in the first instance whether, under the "correct" view of the law, it would still decline to exercise its *sua sponte* authority to reopen Thompson's case. *See Mahmood*, 570 F.3d at 471 (recognizing that, on remand, the Board could still "choose not to exercise its *sua sponte* authority" and "such a decision would be unreviewable by [the Court]"); *Bonilla*, 840 F.3d 575, 592 (ordering the Board to revisit its *sua sponte* reopening decision on a proper understanding of the law and explaining that, "[i]f, on remand, the Board again declines to exercise its *sua sponte* authority to reopen, and does so without relying on a constitutionally or legally erroneous premise, its decision will not be reviewable.").

CONCLUSION

For the foregoing reasons, the Court should dismiss or else deny the petition for review.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,778 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on February 5, 2018. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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